D.B. INCOME TAX APPEAL NO.75/2002
[M/s Sripal Satyapal Vs. Income Tax Officer, Sri Ganganagar]

DATED : 03.01.2007

HON'BLE MR. RAJESH BALIA, J.
HON'BLE MR. CHATRA RAM JAT, J.

Mr.Anjay Kothari for appellant.
Mr.K.K.Bissa for the respondent.

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This appeal is directed against the order of Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur dated 14.05.2002 relating to the Assessment Year 1990-91.

The substantial question of law framed at the time of appeal dated 04.09.2002 reads as under:-

> "Whether the ITAT was justified in disallowing the claim for set off of business loss of Rs.2,54,068/- in the hands of the appellant by applying Section 43 (5) of the Income Tax Act, 1961 and treating the same as speculative loss merely for the reason that transportation charges were not shown to be paid by the appellant?"

The facts necessary for the present purpose are that the assessee is cotton merchants and carries on business of purchase and sale of cotton bales. In the previous year relevant to Assessment Year 1990-91 that is to say for the accounting period ending on 31.03.1990 amongst other, 22 transactions of

cotton bales took place which were held by the Assessing Officer to be speculative transaction. Profit and loss arising therefrom were held to be speculative profit or speculative loss to be treated accordingly under the provisions of Income Tax Act 1961. For treating the said transaction to be speculative reliance was placed by the Assessing Officer on Section 43 (5) of the Act of 1961 which provides that any transaction of sale and purchase of goods, if is settled on due date or otherwise in any manner otherwise that by actual delivery of the goods is to be treated a speculative transaction and profit or loss arising out of such transaction is to be considered the speculative profit or speculative loss. The other facts which are necessary for the present purpose are that out of 22 transactions, 14 transactions related to the purchase of certain cotton bales through M/s Jairamdas Lokesh Kumar commission agent. The physical goods in existence were belonging to M/s Ramchandra Jagdish Prasad, the firm situated at Shri Vijaynagar Distt. Sri Ganganagar and were lying in his godowns. On the very same date the said cotton bales were sold by the assessee through the same commission agent on 22.06.89. The purchase of cotton bales were stated to have been made in March, 1989. The sale of the cotton bales purchased through M/s Jairam Das Lokesh Kumar was made to M/s Om Prakash Vimal Kumar who was acting as commission agent for the real purchaser M/s Oswal Cotton

Company at Vijaynagar Distt. Ajmer.

The following question has been framed as substantial question of law while admitting this appeal arising under Section 260 A of the Income Tax Act, 1961. [the question is repeated]

> "Whether the I.T.A.T was justified in disallowing the claim for set off of business loss of Rs.2,54,068/- in the hands of the appellant by applying Section 43 [5] of the Income Tax Act, 1961 and treating the same as speculative loss merely for the reason that transportation charges were not shown to be paid by the appellant?"

The facts leading to the present appeal are that the assessee appellant is a Cotton Merchant having his place of business at Sri Ganganagar. During the previous year relevant to the Assessment Year 1991 with which we are concerned the assessee had made total sales of Rs.3,09,45,481/- which included sales of Rs.39,19,621/51 in which vouchers of purchases and sales were of the same date respectively. Such transactions numbered in 22. In these transactions the assessee had suffered a loss of Rs.2,54,638/-. The Assessing Officer was of the opinion that this loss was a speculative loss as actual delivery of goods was not taken in these transactions.

As is apparent from the orders of the Assessing Officer as well as the Appellate Orders the emphasis was that the physical delivery of goods was not taken by the assessee or his agent in relation to said 22 transactions and for that reason since physical delivery was not taken by the assessee or his agent the transactions were treated to be speculative in view of sub section [5] of Section 43 of the Income Tax Act, 1961. Consequently it was held that the said speculative loss was not liable to be set off against profits and gains of regular business and could be set off only against speculative profit.

On appeal, this finding was affirmed by the CIT [Appeals] and also by the Tribunal. The Tribunal rested its conclusion on the premise that since assessee has conducted 22 transactions through Aadatias and commission agents then the said transaction could not constitute a speculative transaction if actual physical delivery of goods have been taken by aadaitias or commission agent on behalf of assessee. The only test to find out whether the Aadatias or commission agent working on behalf of assessee had taken actual delivery of goods is by ascertaining transportation charges paid. Since from the perusal of the copies of the accounts of transactions through M/s Jai Ramdas Lokesh Kumar which was taken to be an illustrative case of modus operandi showed that commission agent and brokerage has

only been charged and in none of the transaction accounts any transportation charges have been charged either at the time of purchase or sale. This itself shows that the Aadatias or commission agent had not taken the actual delivery of goods on behalf of the assessee and only the purchase and sale details or delivery note were exchanged in the books of commission agent in the running account of the assessee. The purchase price and sale price have been debited and credited respectively and ultimately the assessee had paid only the difference between the two to his commission agent. On the basis of aforesaid reasoning it was found that since there was no actual delivery of the goods taken by the Aadatia or commission agent ultimately M/s Jairamdas Lokesh Kumar and M/s Mahendra Cotton Co., of Bhatinda on behalf of the assessee, the said transaction cannot be regarded as of regular business. The Tribunal recorded that we find that the assessee could not prove that the delivery was taken by the commission agent on behalf of the assessee.

Since the emphasis was laid on non debiting of charges of transportation for removing the goods from the godowns of the principal seller to the godown, of the commission agent or aadatias or assessee's own godown the said fact has found place in the question framed at the time of the admission as per suggestion made by the assessee.

The modus operandi relevant for the present purposes as found by the Assessing Officer may be noticed as an illustrative case, the transaction which took place on 22.06.1989 through M/s Jairamdas Lokesh Kumar who is a commission agent for the assessee has been detailed in the orders of the subordinate authorities. It was noticed that 100 bales of cotton press mark R-33 from serial No.11417 to 11516 were purchased by the assessee through M/s Jairamdas Lokesh Kumar and sold to M/s Hukamchad Ojha and Co., Sri Ganganagar who was acting for M/s Oswal Cotton Company, Vijaynagar. M/s Jairamdas Lokesh Kumar had entered into transaction of purchase from M/s Om Prakash Vimal Kumar who was the agent for its principal M/s Ramchandra Jagdish Kumar who was holder of cotton bales in question.

After such purchase of cotton bales, on the assessee's direction M/s Jairamdas Lokesh Kumar sold said cotton bales to M/s Hira Chand Ojha who was acting for his principal M/s Oswal Cotton Company, Vijaynagar Distt. Ajmer. In pursuance of these transactions the cotton bales were actually delivered to M/s Oswal Cotton Co. Ltd through transport directly from the godwon of M/s Ramchander Jagdish Kumar. There is no dispute that goods ultimately moved from the godwons of M/s Ramchander Jagdish Prasad as a result of sale transaction at the instance of

respondent assessee and goods in question were ultimately delivered to final buyer in pursuance of transaction carried on at the instance of the assessee.

The question therefore arises whether the intermediary transactions which was ultimately culminated in actual delivery of goods to M/s Oswal Cotton Company Ajmer could be considered as speculative transactions in terms of Section 43 [5] of the Act of 1961 because actual physical delivery was not taken by any of the agents or the principal directing the purchase and sale of the 100 bales of cotton to M/s Jairamdas Lokesh Kumar.

Learned counsel for the appellant has initially pressed into the service the contention that since 100 bales of cotton were ascertained at the godwons of M/s Ramchandra Jagdish Prasad to be dispatched to the ultimate buyer M/s Oswal Cotton Company for whom Sri Hukamchand Ojha and Co. had purchased 100 bales of cotton from said M/s Jairamdas Lokesh Kumar who has conducted sale as per direction of assessee and, therefore, it must be taken that the physical delivery of goods were taken by M/s Jairamdas Lokesh Kumar when he ascertained and segregated the goods for the purpose of dispatching the same to M/s Oswal Cotton Company, which satisfies the test of actual delivery of the goods to the

assessee.

In the alternative it is contended by the learned counsel for the assessee that in terms of Section 43 (5) of the Act of 1961 the requirement is not that physical goods must be taken by the assessee himself but the emphasis is on the fact that transactions entered into by assessee must ultimately culminate into the physical delivery of the goods. If that test is applied on the facts found by the Assessing Officer himself the transaction of sale and purchase entered into by the assessee has ultimately culminated in physical delivery of the goods from the holder of the goods to the ultimate buyer of the goods. If the actual physical delivery of the goods has taken place as a result of transaction carried out by the assessee then the transaction of the assessee cannot be termed as speculative transaction and loss arising therefrom cannot be treated as speculative loss to be dealt with separately.

It will be apposite to notice the provision of Statute in the light of which the consequences of the facts found by the Appellate Authority must be determined. Section 43 (5) reads as under:-

> (5)“Speculative transaction means a transaction in which a contract for the purchase or sale of any

commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:-

Provided that for the purposes of this clause:-

[a] a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or

[b] a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss or in his holdings of stocks and shares through price fluctuations; or

[c] a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may be arise in the ordinary course of his business as such member; shall not be deemed to be a speculative transaction;"

On perusal of the aforesaid provision it envisages that there is no reference for requirement of actual delivery or transfer of the commodity or the scrips by the assessee or his agent. The emphasis is on settlement of transaction otherwise than by the actual delivery or transfer of the commodity or the scrips. Therefore, in our opinion the Appellate Authority as well as the Assessing Authority misdirected themselves in law by focusing their attention on actual physical delivery being taken by the assessee or his agent rather than considering whether

transactions entered by the assessee were ultimately settled by delivery of goods or otherwise.

If we consider the modus in which the transactions have proceeded it leaves no room of doubt that ultimately they resulted in actual delivery of goods only in pursuance to said transactions. Actual delivery of goods were not independent of transaction conducted at the instance of the assessee. The transaction of sale and purchase of commodities entered by the assessee through his commission agent or agents whether at Sri Ganganagar or at Punjab have been settled by actual delivery of goods to the last person in the chain and not otherwise then by actual delivery of the goods. The fact that the account of the assessee with his agent or commission agent has been settled on commercial principles by finding out what is the cost incurred on behalf of the assessee and what payment he has received on behalf of the assessee is not relevant for the purpose of determining the actual nature of transaction nor what charges have actually been debited to the assessee's account by the principal seller of the goods is relevant.

The other may be relevant for the purpose of finding when the property of goods passed on to the buyer under Section 18 of the Sale of goods Act which envisages that property in goods

passed when the goods are ascertained and where the transaction of sale of goods is in respect of ascertained goods, the property in goods passes to buyer immediately. In the facts of present case, it can be said that when assessee's agent ascertained the 100 bales of cotton at site namely the ginning factory of Ramchander Jagdish Chander, the property in those 100 bales passed on to buyer and thereafter said goods were held by the holder on behalf of buyer as a bailee. But that does not amount to physical delivery of the goods to the buyer. Therefore, so far as the finding of the Tribunal that physical delivery of the goods were not taken by the assessee or his agent may be true but catch lies in the fact of taking the physical delivery of the goods by the assessee is not the test for determining the speculative transaction in terms of Section 43 (5) but the test is settlement of the transaction entered into by the assessee on his behalf otherwise then by actual delivery of the commodity or scrips. As we have noticed that ultimate settlement of the transaction entered into by the assessee has been settled by the actual delivery of the goods to ultimate buyer, therefore in terms of sub-section (5) of Section 43, the transactions cannot be branded as speculative transaction.

The non-debiting of transport charges when the goods have not actually moved from godown of holder of goods to

godown of assessee or assessee's agent cannot be decisive of actual delivery of goods having been made in pursuance of sale made by the assessee. The real test is whether the goods have been actually delivered to a buyer in pursuance of transaction of sale entered into by or on behalf of the assessee or independent of it. Since in the present case on the facts found by the Revenue Authority the ultimate delivery of goods was only in pursuance of transaction carried out at the instance of the assessee, it cannot be said that the transaction has been settled otherwise than by actual delivery of commodity so as to invite operation of Section 43 (5). So long as nexus between actual delivery of goods and the transaction of sale conducted by assessee himself or through his agent exist, the actual settlement of account between the assessee and his agent cannot affect the nature of transaction from real to speculative. In such event actual payment or receipt is merely a convenient mode of settling the account, distinct from settling the transaction.

In these circumstances, it must be held that Tribunal has seriously erred in law in holding that the transactions in question are speculative transactions and considering the loss arising therefrom as speculative loss.

Since on true interpretation of Section 43 (5) the transaction in question must be held to be non-speculative, loss arising therefrom is liable to be set off against profit and gains arising from the regular business of the assessee in ordinary course. As a result, the appeal is allowed the orders passed by the Tribunal, CIT [Appeals] and Assessing Officer are set aside. The Assessing Officer is directed to recompute the profit and gains of business by considering the loss in question to be business loss and make assessment accordingly. No costs.

[CHATRA RAM JAT], J. **[RAJESH BALIA], J.**

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